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The Question Raised by Lawrence:
Marriage, the Supreme Court and a Written Constitution

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In Lawrence v. Texas, the Supreme Court concluded that state legislatures could not criminalize homosexual sodomy. Many (including Justice Scalia in dissent) noted that Lawrence raises a serious question regarding the future of marriage: Can marriage any longer be defined as the union of a man and a woman? But Lawrence also raises another sober question: Does America still have a written Constitution?

The answers are unknown.

As a result, and depending upon who is speaking, the President and the Senate are either preserving, ignoring, rewriting, or destroying the Constitution each time an individual is nominated or confirmed to the federal bench. Because of decisions like Lawrence , the selection of those who determine "what the Constitution means now" has become one of the Nation's most contentious political issues. The federal judiciary is no longer the "least dangerous branch," as contemplated by Federalist advocates such as James Madison and Alexander Hamilton. Rather, the anti-Federalist essayist Brutus, who was fiercely critical of the potential power of the Article III courts, provides a more accurate description of modern constitutional law, where "it is impossible . . . to say" what "the principles are, which the courts will adopt," except that they "may, and probably will, be very liberal ones" that are not confined to the "letter" of the Constitution.

The views of James Madison and Alexander Hamilton - not Brutus - carried the day in 1789. The Constitution was adopted by a Founding Generation which assumed that, while the document would be subject to amendment and interpretation, the amendment process was vested where it belonged - in the hands of "the People" - with the interpretative process safely left to judges who would apply (but not create) the law. These assumptions of Madison and Hamilton, however, are seriously out-of-place in a world where lawyers, law professors, politicians and even Supreme Court Justices are fixed upon the purported virtues of "a living Constitution" - a Constitution so "alive" that its meaning changes with each new appointment to the federal bench.

How did America's fundamental political charter become so vaporous that the Nation's entire political structure trembles each time a new Justice is named to the Supreme Court? The genealogy of Lawrence tells the tale.

Lawrence relies upon a constitutional right not set out in the actual language of the Bill of Rights

and the Fourteenth Amendment - the increasingly ubiquitous modern "right of privacy." This right was first announced by the Supreme Court in its 1967 decision in Griswold v. Connecticut. The case involved the State of Connecticut's legislative decision to regulate the use of condoms by married couples - a law that, in the mid-1960's, was quaint and anachronistic. But rather than wait for the ordinary processes of democratic debate to adjust state policy, the Supreme Court assumed the task of freeing the electorate of Connecticut (and America in general) from a law the dissenting Justices called "silly." The Court emancipated the country from the bonds of silliness by noting that the Connecticut law regulated the marital relationship, a union between a man and a woman, that was - in the words of the Court - "intimate to the degree of being sacred." This sacred relationship, the Court concluded, must be supported by a "right to privacy," even though the Constitution nowhere mentions the right.

The Court did not consider whether its new analysis was consistent with the long-standing history and traditions of the American people. It could not undertake such an analysis because any careful review of actual historical practices would have shown that - however out-of-touch Connecticut's law appeared in the middle of the 1960's sexual revolution - states throughout the nation had regulated the sexual conduct of married and unmarried citizens by means of adultery, incest and fornication laws from the dawn of the Republic. The policies animating these laws (as noted by the concurring opinion in Griswold) may have seemed less "silly" in 1967 than a prohibition on condom usage, but adultery, incest and fornication laws are rather hard to distinguish on constitutional grounds from Connecticut's regulation of marital fecundity. As the dissenting Justices pointed out, nothing in the text of the Constitution invalidated Connecticut's law simply because it was "unreasonable" or "unwise."

Because neither the words of the Constitution nor the specific history and traditions of the American people invalidated Connecticut's law, the Court was required to fashion a new analysis that would set aside the state's condom policy. Accordingly, the Court announced that the "specific guarantees in the Bill of Rights have penumbras" (or partial shadows) that give the actual wording of the Constitution "life and substance."

In real life, the substance of shadows (and particularly partial shadows) is questionable and they result from the lack, not the presence, of light. Nevertheless, relying upon dimness, the sacred nature of marriage and the talismanic word privacy, the Court walked away from the specific guarantees of the United States Constitution as well as the history, experience and traditions of the American people. The judicial journey begun in Griswold has now brought into constitutional doubt the "sacred" union of "marriage" upon which Griswold itself rests. As a result, Americans must act - not only to protect the union lauded in Griswold - but to reinstate what Chief Justice John Marshall in 1803 called "the greatest improvement on political institutions" achieved in America: the establishment of "a written constitution."

Legal scholars applauded the rather startling analysis of Griswold. They wrote elaborate justifications for the use of "privacy analysis" to abolish legislative anachronisms with a minimum of fuss and bother. They paid little heed to Justice Black's warning that Griswold had dramatically altered the meaning of the Bill of Rights by "substitut[ing] for the crucial word or words" of various constitutional guarantees "another word" - privacy - that could be "more or less flexible and more or less restricted in meaning" than the Constitution's original text. They similarly ignored the warning that Griswold's broad notion of a "living Constitution" threatened the very existence of the "written Constitution" lauded by John Marshall.

In the rush to support the purportedly enlightened approach of Griswold, too many Americans - including citizens, lobbyists, lawyers, law professors and judges - seemed to forget that

constitutional law involves much more than ensuring "proper" results in particular (even silly) cases. Those who drafted the document viewed the Constitution's distribution of decision making power between and among the various branches of state and federal government as its most important role; the very foundation of American liberty. Because various results may be "proper" at different times and in different circumstances, the constitutional distribution of decision making power in 1789 was - and remains today - profoundly important.

The Constitution was not drafted to resolve every difficult, troublesome and/or controversial issue of public policy. In the areas where it speaks rather clearly, the Constitution leaves final decision making authority with the judiciary. If state or federal governments exercise power in a manner that encroaches upon core constitutional values (as set out in constitutional text construed in light of the actual practices, experience and traditions of the American people) , the judiciary must act to protect those values. But the drafters of the American Constitution believed this judicial role would be exceptional and rarely invoked. As the Federalist papers proclaim, the judiciary is the "least dangerous" branch because judges do not create policy but merely exercise "judgment." The really difficult questions, the Founders thought, were left to the people.

The Supreme Court has departed from the decision making structure established by the Founders on more than one occasion. Prior to Griswold and Lawrence, the most recent period of judicial excess was ended (at least in part) by President Roosevelt's famous threat to "pack the Court" in 1937. From the late 1890's to the mid-1930s, the Justices of the Supreme Court invalidated various state and federal legislative judgments on the ground that they unduly interfered with the "liberty" of American citizens. Back then the unwritten freedom that the Court enforced was not privacy, but economic liberty.

In Lochner v. New York, for example, the Court struck down a law establishing a 10-hour workday for bakery employees who labored near hot and dangerous wood- and gas-fired ovens. Why was this seemingly sensible regulation unconstitutional? Because, by setting a limit on the number of hours an employee could work, New York had unduly interfered with the right of free men to negotiate their own terms of employment. In the 1920s, the shadows of the Constitution protected a rather unusual constitutional right indeed: the "right" of New York bakers to work themselves to death.

By 1936, cases like Lochner threatened to invalidate the Roosevelt Administration's efforts to ease the economic suffering caused by the Great Depression. Various provisions of the New Deal interfered with economic rights highly valued by the Justices. After the Supreme Court invalidated parts of the National Industrial Recovery Act and the Agricultural Adjustment Act in 1935 and 1936, President Roosevelt went on the offensive. Following his election to a second term, in one of his famous "fireside chats," he threatened in 1937 to appoint a new Supreme Court Justice for each one of the "nine old men" on the Supreme Court over the age of 70. These Justices, the President declared, were "out of touch" with the needs of ordinary Americans, the economic realities of the day, and even the intentions of the Founders. Such a strong message from a popular president prompted Congress to hold hearings on the proposal, but before any changes were made, the Supreme Court abandoned its enforcement of non-enumerated constitutional liberties and the president abandoned his plan to pack the Court.

Between December 1936 and the end of the first quarter of 1937, the Supreme Court made an abrupt about-face. On the heels of President Roosevelt's challenge, the Court began to implicitly condemn its prior decisions as unwarranted judicial departures from the text of the Constitution. Rather than invalidating legislation because it restricted the unenumerated economic liberties of American citizens, the Court wrote regarding the obligation, duty and privilege of free men and

women to govern themselves by debating and deciding difficult questions of social and economic policy. The Court seemingly recalled (and conducted its business pursuant to) Chief Justice John Marshall's famous dictum in Marbury v. Madison that "the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." Throughout the early 1960's, the Court regularly opined regarding the dangers of enforcing judicially preferred policies, in disregard of the text, structure and history of the American Constitution. Unfortunately, Griswold (and subsequent privacy cases) paid little heed. The contraception law in Griswold was, as Justice Stewart observed, "uncommonly silly" and outdated. But however proper the result in Griswold seemed (and still seems today), the analysis launched by the case encouraged social activists, lawyers, law professors and judges to increasingly ignore that Article III does not establish the federal courts as the perpetual censor of unreasonable legislation or as the ultimate arbiter of all divisive moral controversies.

Most legislative and executive decisions are not controlled (and cannot be controlled) by the presciently precise language of the Constitution. If the "correct" answers to pressing questions are fairly debatable, those questions must be - indeed, should only be - resolved by legislative action. The "correct" answers to such questions as the appropriate level of welfare assistance, the purity of the nation's air, and the sexual conduct of its citizens are fairly debatable and, therefore, left for resolution by state and national legislatures.

This is particularly true when government action involves moral questions. And although it seems almost prehistoric to note that government action implicates moral issues, questions of morality abound in government decision making. The all-too-common contention that "government has no business regulating morality" makes a good sound bite, but not much sense. Governmental decisions always involve striking a balance between competing moral values. To whom should society pay welfare benefits? How much? When? These and thousands of other questions addressed daily by government necessarily will be resolved in favor of one moral view or another. The "right to privacy," enunciated in Griswold and expanded in cases thereafter, has rendered the American legal system increasingly oblivious to the reality that debatable moral and ethical questions are poor candidates for judicial resolution.

Following Griswold, the privacy right supposedly founded on the "sacred" institution of "marriage" was extended to unmarried couples, a substantive result that (again) sparked little disagreement. But the Court's expansion of privacy to include abortion in Roe v. Wade revealed how easy it is for judges to stumble when walking through constitutional shadows. Roe starkly revealed the kinds of questions the Court (rather than the people) would decide under the penumbral "right to privacy."

The Roe Court took pains to explain that abortion was particularly well suited for judicial resolution precisely because it involved (among other things) "the difficult question of when life begins;" a question upon which the Court need not "speculate as to the answer." But, despite this disclaimer, the Court announced that a woman could terminate the life of an unborn child for any (or no) reason at any time prior to the point when the child could live outside the womb. By providing a speculative response ("life," or at least legally cognizable "life," begins at "viability") to a question the Court purportedly did not need to "answer," the unusual contours of the a-constitutional right of privacy at last drew significant attention. Philosophers, ethicists and many Americans recognized that the utilitarian reasoning of Roe raised a host of disconcerting questions. For the first time since Griswold, many Americans paused. It seemed the Court might, too.

Roe forced America (and the Court) to confront whether the Constitution, in fact, mandates

judicial resolution of social controversies precisely because they are moral, divisive and difficult. The legal academy that had nurtured privacy analysis and warmly welcomed Griswold now rushed to rewrite and re-explain the Supreme Court's astonishing decision. Thousands of pages in the law reviews were dedicated to sophisticated (and often incomprehensible and contradictory) justifications for Roe's elimination of democratic debate and decision making at the very moment they were needed most. These obviously post hoc apologetics embarrassed the Court and for many years the Court was hesitant to lengthen the shadows of Griswold.

Indeed, in the 1986 opinion in Bowers v. Hardwick, the Court avoided the right to privacy altogether and looked (at long last) to the language of the Constitution and the teachings of long-standing American traditions and history. Because there is nothing in the language of the Constitution that directly addresses the question, Bowers concluded that states could decide whether or not to regulate homosexual conduct, even if the chosen course seemed prudish, silly or outdated. The right to privacy did not dictate a contrary result, the Court noted, because human sexuality involves debatable questions of morality that have been regulated for centuries - and might warrant regulation today. The Bowers Court also noted that homosexual behavior, unlike that involved in Griswold and Roe,"bear[s] [no] resemblance" to "family relationships," "marriage," or procreation."

Even Roe underwent a transformation during this momentary waning of privacy analysis. In the 1992 decision of Planned Parenthood v. Casey, the Supreme Court pointedly did not reaffirm the reasoning of Roe v. Wade. As the dissenting Justices noted, the controlling opinion for the Court could not "bring itself to say that Roe was correct as an original matter." Caught in a difficult gap between Roe's faulty logic and its refusal to reject Roe's result, the Court resorted to stare decisis - a doctrine which provides that a legal question, once decided, remains decided. Roe may have gotten it wrong, the Court announced, but right or wrong the decision would stand. It looked like the right to privacy had itself become penumbral.

But, at least in constitutional law if not in real life, never underestimate the compelling substance of partial and incomplete shadows. The decision in Lawrence v. Texas demonstrates that the Court has recovered from the bout of judicial modesty it suffered between Bowers and Casey. The penumbra of privacy is back.

Roe didn't get it wrong after all. Rather, it is Bowers (and the hesitant approach of Casey) that are constitutionally suspect. Bowers, in fact, is reversed. Lawrence declares that the reasoning of Bowers - that family, marriage and procreation are sturdy enough social interests to overcome the judicially created right to privacy - is fatally flawed. According to the Court, Griswold was wrong, too. Forget all that talk in 1967 about the "sacred" nature of the "marital union;" privacy (following the Court's further consideration) has nothing at all to do with marriage, procreation, or the bearing and rearing of children. Instead, privacy vests sexual partners with a constitutional entitlement to determine their "own concept of existence, of meaning, of the universe, and of the mystery of human life." And under this "concept of existence" and "mystery of human life" clause, government may not "demean" consenting adult sexual behavior.

Accordingly, society may have no business making any distinction between a marital union of a man and a woman and a sexual partnership between two men, two women or (why not?) three men and four women. If marriage is "sacred" (as Griswold declared) can society "demean" other sexual relationships under Lawrence by suggesting they are not? Furthermore, can a state even require sexual fidelity between spouses? If it does, doesn't that "demean" individuals whose "meaning of the universe" includes "open marriage"? Probably. Thus, marriage may no longer mean a man and a woman, two people, sexual exclusivity, or exclude partnerships between close

relatives.
Thus, through the questionable logic of legal reasoning purposely freed from the tethers of the actual language of the United States Constitution and American tradition, a purported right which sprang from the centuries' old social institution called marriage may soon become that institution's very undoing. No wonder Justice Scalia notes that Lawrence "leaves on pretty shaky grounds state laws limiting marriage to opposite sex couples."
Following Lawrence, the Massachusetts Supreme Judicial Court relied upon the reasoning of the Supreme Court's opinion to hold that the Massachusetts Constitution, although nowhere discussing or addressing the matter in its actual text, demands official recognition of same-sex marriage. In reaction to Lawrence and the Massachusetts decisions, voters in 11 states last November amended their state constitutions to define marriage as the union of a man and a woman. This unusual action by states ranging in political views from Mississippi to Utah to Oregon does more than prevent state courts from invoking privacy (or other judicial innovations) to redefine marriage - it also demonstrates the growing unease of Americans with expanding state and federal judicial power. Americans are becoming aware that, over the past 40 years, the judiciary's increasing disregard of constitutional strictures has deprived them of the ability to answer many of the political questions that affect them most. Marriage is just one of the more recent questions the judges are about to take from the hands of American voters.
As a result, more than marriage is on shaky ground. So is America's "greatest improvement on political institutions:" the idea of "a written constitution."
The reasoning in Lawrence erodes democratic control of debatable - and unquestionably difficult - issues of moral concern. By substituting a potentially far-reaching (and as yet undefined) "concept of existence, of meaning, of the universe, and of the mystery of human life" test for the actual text of the Constitution, Lawrence seriously erodes the ability of American citizens to engage in open and honest political discussions regarding the outcome of an unknown range of fairly debatable moral controversies. Such questions - ranging from cloning and biomedical research to euthanasia and children's rights - involve some of the most pressing issues of modern life.
After Lawrence, which democratic judgments in these areas will survive the new (and apparently individualistic and idiosyncratic) "concept of existence" and "mystery of human life" test? Who can tell? Will the long-standing definition of marriage as the union of a man and a woman withstand judicial analysis? No one knows - although the Massachusetts Supreme Judicial Court's invocation of Lawrence suggests that the answer is "No."
Throughout America, ordinary citizens, lawyers, law professors, legislators and judges obviously disagree regarding the meaning of marriage. The existence of this deep disagreement, however, demands that the people be allowed to vote on a Federal Marriage Amendment to express their constitutional views regarding the meaning, content and social role of Griswold's sacred relationship.
Marriage is an essential and long-standing social institution with profound importance for the social health of American society. Furthermore, while it is unclear what impact judicial redefinition of marriage might have on American society, there is surprisingly general agreement that further debilitation of marriage in America would be dangerous indeed. The meaning and social role of marriage is too important - and the current health of the institution too fragile - for its meaning and future vitality to be determined by the oligarchic votes of as few as five Members of the Supreme Court. As Abraham Lincoln warned in his First Inaugural Address: "if the policy of the government upon vital questions affecting the whole people is to be irrevocably

fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation . . . , the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

Accordingly, at the end of the day, Lawrence raises a fundamental question regarding the constitutional process for defining marriage in America. The pressing issue is whether the People or the Court should decide the outcome of a debatable, divisive, difficult - even transcendent - question of social morality. The Supreme Court's decision in Lawrence portends that the meaning of marriage will soon be removed from the realm of democratic debate, adjustment, compromise and resolution. This is a serious, and profoundly suspect, matter of structural constitutional law.

America in 2005 faces the question President Roosevelt confronted in 1936 and 1937: When the precise words of the Constitution, considered in light of the country's constitutional traditions, do not provide an indisputable answer for the resolution of a contentious moral, ethical and political question, who charts the Republic's course? The People or the Court? This is the question raised by Lawrence.

All Americans should care how it is answered.